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No. 909

In the Supreme Court of the United States

OCTOBER TERM, 1958

GENERAL RETAIL CORPORATION (DELAWARE),
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The findings of fact and opinion of the Tax Court (Pet. 1a–8a) are reported at 29 T.C. 632. The *per curiam* opinion of the Court of Appeals (Pet. 10a) is reported at 262 F. 2d 591.

JURISDICTION

The judgment of the Court of Appeals was entered on January 2, 1959. (Pet. 10a.) A petition for rehearing was denied on February 11, 1959. (Pet. 10a.) The petition for a writ of certiorari was filed on May 11, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether taxpayer is entitled to the preferential treatment accorded to new corporations by Section 430(e) of the Internal Revenue Code of 1939 (relating to Korean War excess profits taxes).

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Internal Revenue Code of 1939 (Sections 430, 445 and 503); Treasury Regulations 111 (Section 29.503(a)–2); and Treasury Regulations 130 (Section 40.430–2(e)), are set forth in the Appendix, *infra*, pp. 7–11.

STATEMENT

The material facts as found by the Tax Court (Pet. 1a–4a) may be summarized as follows:

The taxpayer-corporation was chartered under the laws of Delaware on September 30, 1948, and has its principal office at Nashville, Tennessee. (Pet. 1a.)

General Shoe Corporation, which commenced business in 1925 and has continuously engaged in business since that time, owned all of the outstanding stock of the taxpayer at all times material hereto. (Pet. 2a–4a.)

During November, 1948, taxpayer acquired substantially all of its assets from its parent corporation (General Shoe Corporation) at their book value on the books of General Shoe, which extended credit to taxpayer on open account. (Pet. 3a–4a.)

Taxpayer maintained its books and records on an accrual basis for fiscal years ended October 31. In

filing its income tax return for the fiscal year ended October 31, 1951, taxpayer computed its excess profits tax as a new corporation pursuant to Section 430(e)(1) of the Internal Revenue Code of 1939. (Pet. 1a, 4a.)

The Commissioner determined that taxpayer was not entitled to compute its excess profits tax on that basis. (Pet. 4a.) The Tax Court sustained the Commissioner (Pet. 8a) and the Court of Appeals affirmed. (Pet. 10a.)

ARGUMENT

Both of the courts below sustained the Commissioner's determination that the taxpayer-corporation is not entitled to the preferential treatment accorded to new corporations by Section 430(e) of the 1939 Code, as added by Section 501 of the Revenue Act of 1951, c. 521, 65 Stat. 452 (Appendix, *infra*), and we submit that the decision is clearly correct.

In November, 1948, taxpayer acquired all of its assets (retail shoe stores) from its parent corporation and sole stockholder, General Shoe Corporation. (Pet. 4a.) Obviously, the same individuals who owned the stock of General Shoe Corporation were, for all practical purposes, the owners of the subsidiary corporation. As the courts below concluded from analysis of the relevant provisions, it is the "clear statutory command" that constructive ownership of stock shall be treated as equivalent to actual ownership in situations like the one at bar. (Pet. 8a, 10a.)

General Shoe Corporation had commenced business in 1925 (Pet. 4a) and hence could not qualify as a new corporation under Section 430(e). Section

430(e)(2)(B) provides that in certain circumstances a taxpayer shall be considered to have commenced business on the date when another corporation commenced business. This is so where, during or prior to the taxable year, such other corporation was a party with taxpayer to a transaction described in Section 445(g)(2). Subparagraph (B) of Section 445(g)(2) covers an acquisition by the taxpayer of a substantial part of its assets from another corporation, if 50 per centum or more in value of the outstanding stock of taxpayer is directly or indirectly owned, at the time of such acquisition, by individuals owning, directly or indirectly, 50 per centum or more in value of the outstanding stock of the transferor. These provisions are correlated with, and explained by, paragraph (3) of Section 445(g), which states that the provisions of Section 503 shall be applicable in the determination of ownership of stock. And Section 503(a)(1) sets forth that stock owned, directly or indirectly, by or for a corporation, partnership, estate, or trust shall be considered as being owned proportionately by its shareholders, partners, or beneficiaries.

In short, the provisions of Section 445(g)(2)(B) are incorporated into Section 430(e) by explicit reference, and the former expressly requires the use of Section 503 for purposes of determining ownership. That being so, taxpayer is barred from preferential tax treatment by the clear command of the statute. (Pet. 8a, 10a.)

In view of this clear statutory command, the courts below found it inappropriate to consider the legisla-

tive history. See *Helvering* v. *City Bank Co.*, 296 U.S. 85, 89. However, examination of the congressional reports makes it even more plain that Congress never intended to treat a corporation like the instant taxpayer as a new corporation for purposes of the preferential rates. Such rates were intended to encourage new techniques, new processes and new corporations and were purposefully denied to new corporations whose assets were transferred from old corporations under the same control. See S. Rep. No. 781, 82d Cong., 1st Sess., pp. 72–74 (1951–2 Cum. Bull. 458, 509–510); Summary of the Provisions of the Revenue Act of 1951 as agreed to by the Conferees prepared by the Staff of the Joint Committee on Internal Revenue Taxation, October, 1951, p. 47 (1951–2 Cum. Bull. 287, 322).[1]

It should also be noted that the question raised by the petition is of no general importance. The taxing provisions involved are inapplicable to tax years beginning on or after January 1, 1954 (Section 430(a) of the Internal Revenue Code of 1939, as amended by the Act of July 16, 1953, c. 202, 67 Stat. 175) and it does not appear that the decision here will affect any significant number of pending cases.

[1] The incongruity of taxpayer's construction of the statute (Pet. 6) is illustrated by its contention that the special rates should be accorded to a new corporation acquiring all its assets from the parent corporation owning its stock, but denied to a new corporation acquiring its assets from another corporation if the stock of both corporations was owned by the same individuals.

CONCLUSION

The decision is correct. The case presents no question of general importance and there is no conflict of decision among the circuits. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.
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JUNE 1959.

APPENDIX

Internal Revenue Code of 1939:

SEC. 430 [as added by Sec. 101 of the Excess Profits Tax Act of 1950, c. 1199, 64 Stat. 1137] IMPOSITION OF TAX.

(a) *General Rule.*—In addition to other taxes imposed by this chapter, there shall be levied, collected, and paid for each taxable year ending after June 30, 1950, and beginning before July 1, 1953, upon the adjusted excess profits net income as defined in section 431, of every corporation (except a corporation exempt under section 454) an excess profits tax equal to whichever of the following amounts is the lesser:

(1) 30 per centum of the adjusted excess profits net income, or

* * * * *

(e) [as added by Sec. 501 of the Revenue Act of 1951, c. 521, 65 Stat. 452] *New Corporations.*—

(1) *Alternative amount.*—In the case of a taxpayer which commenced business after July 1, 1945, and whose fifth taxable year ends after June 30, 1950, the amount referred to in subsection (a)(3) shall be—

* * * * *

(B) If the taxable year is the third taxable year of the taxpayer, an amount equal to 8 per centum of the excess profits net income for the taxable year, except that if the excess profits net income exceeds $300,000, the amount shall be the sum of $24,000 plus the amount determined under subparagraph (E) of this paragraph.

* * * * * *

(2) *First five taxable years.*—For the purpose of this subsection—

(A) The taxable year in which the taxpayer commenced business and the first, second, third, and fourth succeeding taxable years shall be considered its first, second, third, fourth, and fifth taxable years, respectively.

(B) The taxpayer shall be considered to have been in existence and to have had taxable years for any period during which it or any corporation described in any clause of this subparagraph was in existence, and the taxpayer shall be considered to have commenced business on the earliest date on which it or any such corporation commenced business:

(i) Any corporation which during or prior to the taxable year was a party with the taxpayer to a transaction described in section 445(g)(2) (A), (B), or (C), determined as if the date "July 1, 1945" were substituted for the date "December 1, 1950" in section 445(g)(2)(C).

* * * * *

(26 U.S.C. 1952 ed., Sec. 430.)

SEC. 445 [as added by Sec. 101 of the Excess Profits Tax Act of 1950, *supra.*] AVERAGE BASE PERIOD NET INCOME—NEW CORPORATION.

(a) *New Corporation.*—A taxpayer which commenced business after the first day of its base period shall, except as provided in subsection (g), be considered a new corporation for the purposes of this section, and its average base period net income determined under this section shall be the amount computed under subsection (b).

* * * * *

(g) *Ineligible Corporations.*—

(1) If a taxpayer, on or after December 1, 1950, and prior to the end of its third taxable year, acquires any properties in any of the transactions described in paragraph (2), it

shall not, for the taxable year in which such acquisition occurs or for succeeding taxable years, be entitled to the benefits of this section except under the circumstances and subject to the limitations provided in section 462(g).

(2) The transactions to which paragraph (1) applies are as follows:

* * * * * *

(B) The acquisition by the taxpayer of a substantial part of its assets from another corporation, or of a substantial part of the properties of another corporation, if 50 per centum or more in value of the outstanding stock or outstanding voting stock of the taxpayer is directly or indirectly owned, at the time of such acquisition, by individuals owning directly or indirectly 50 per centum or more in value of the outstanding stock, or outstanding voting stock of the transferor;

* * * * * *

(3) For the purposes of this subsection, the provisions of section 503 shall be applicable in the determination of ownership of stock.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 445.)

SEC. 503. STOCK OWNERSHIP.

(a) *Constructive Ownership.*—For the purpose of determining whether a corporation is a personal holding company, insofar as such determination is based on stock ownership under section 501(a)(2), section 502(e), or section 502(f)—

(1) *Stock not owned by individual.*—Stock owned, directly or indirectly, by or for a corporation, partnership, estate, or trust shall be considered as being owned proportionately by its shareholders, partners, or beneficiaries.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 503.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

> SEC. 29.503(a)–2. *Stock not owned by individual.*—In determining the ownership of stock for any of the purposes set forth in section 29.503(a)–1, stock owned, directly or indirectly, by or for a corporation, partnership, estate, or trust shall be considered as being owned proportionately by its shareholders, partners, or beneficiaries. For example, if A and B, two individuals, are the exclusive and equal beneficiaries of a trust or estate, and if such trust or estate owns the entire capital stock of the M Corporation, and if the M Corporation in turn owns the entire capital stock of the N Corporation, then the stock of both the M Corporation and the N Corporation shall be considered as being owned equally by A and B as the individuals owning the beneficial interest therein. See also section 29.503(a)–6.

Treasury Regulations 130, promulgated under the Internal Revenue Code of 1939:

> SEC. 40.430–2 [as amended by T.D. 5997, 1953–1 Cum. Bull. 312, 314]. *Rate of tax.*— * * *
>
> (e) *New corporations.* * * *
>
> * * * * *
>
> (5)(i) If any corporation during or prior to the taxable year for which the excess profits tax is being determined was a party with the taxpayer to a transaction described in section 445(g)(2) (A), (B), or (C), determined as if the date "July 1, 1945" were substituted for the date "December 1, 1950" in section 445(g)(2)(C), and if such other corporation had commenced business prior to the date on which the taxpayer commenced business, then the taxpayer, under the provisions of section 430(e)(2)(B)(i), shall be deemed to have commenced business on the date such other corpo-

ration commenced business. The taxpayer shall also be considered to have been in existence during the whole period such other corporation was in existence and to have had taxable years during such period as determined under the provisions of (4) above. * * *

* * * * *

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